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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-452

THE BOEING COMPANY and THOMAS R. WILCOX,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

BRIEF FOR PLAINTIFFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Questions Presented

The questions are:

1. whether the holding of the Court of Appeals on the existence of a federal claim is in conflict with the decisions of this Court and

2. whether the admitted existence of diversity jurisdiction and the presence of other federal claims mean that the Court is being asked to review an academic question.

The Reasons for Denial

We respectfully submit that Rule 19 has not been satisfied for the following reasons:

1. it is not contended that a new exposition is needed of what is required to state a federal claim; this Court within the past two years has twice made the subject clear;

2. a reading of the opinion of the Court of Appeals leaves no doubt as to the substance of the claim;

3. Boeing's effort to equate the Court of Appeals' characterization of the claim as "colorable" with "insubstantial" is an unsuccessful exercise in semantics and raises no real question;

4. so far as this case is concerned a review of the holding as to the federal claim is academic because

   a) Boeing admits that there is diversity jurisdiction and

   b) there are other federal claims which the Court put to the side as unnecessary to the decision; and

5. if the substantive issue is to be determined under state law, the Court of Appeals properly determined what that law is.

Statement of the Case

We shall endeavor to repeat as few of the facts as possible and to confine this statement to those which are directly relevant to the questions presented.

Boeing is a Delaware corporation. Plaintiffs reside in various states from New York to California and from Massachusetts to Florida. Several plaintiffs have suffered, individually, losses in excess of $10,000. For example, one of our clients, Dennis J. Finn, a resident of Florida, owned at all relevant times and still owns debentures of a face value of $20,000. The difference between the redemption price and the price of the stock into which he was entitled to convert was more than $52,000. (There were additional losses of rights and dividends on the stock which he should have received).

When Boeing issued the $30,597,600 of debentures in 1958, more than 75% were taken up by stockholders who exercised rather than sold their rights.

As in the case of convertible securities generally, these debentures were protected by an anti-dilution clause. The basic conversion privilege was to exchange $100 face of debentures for two shares of Boeing common stock. The anti-dilution clause provided a formula pursuant to which if Boeing were thereafter to issue shares of common at less than $50 a share, an upward adjustment would be made in the conversion rate and when that rate reached 2.045 or more, the debenture holder would be entitled to 2.05 or more shares for each $100. The .05 of a share made a difference of millions of dollars.

In 1959 and 1960 Boeing issued nearly a million shares of common stock at less than $50 a share. Its computation of the new rate was 2.0448 or .0002 less than the 2.045 which would have required the increase in shares to be given to the debenture holders. Plaintiffs claim that

this computation was a deceit and a violation of Section 10(b) and of Rule 10b-5. The substantiality of that claim may be gathered from the pages devoted to it by the Courts (51a-59a, 26a-30a).* It was the principal issue at the trial.

Boeing also violated the Trust Indenture Act of 1939 by not providing lists of bond holders to the Trustee. The Court of Appeals referred to Boeing's "token compliance" (12a, Footnote 11).

In 1966, Boeing elected to call the debentures. What it did do and did not do are related in the opinion of the Court of Appeals. Plaintiffs contend that the "call" violated Section 10(b) and Rule 10b-5 in that it was a tender of a deceitful number of shares and in that the kind of notice given operated as a fraud on the holders. (Cf. as to the latter, S.E.C. correspondence in *Karl E. Sommerlatte* CCH Federal Securities Reporter, '71-'72 Binder, Par. 78,557 (October 8, 1971)).

ARGUMENT

POINT I

The only federal question raised by the petition is one which has been settled.

What is the question raised in the petition? If it is "When is a federal claim sufficient to support federal jurisdiction?" then the answer has been given fully in *Goosby* v. *Osser,* 409 U.S. 512, 518 (1973) and *Hagans* v. *Lavine,* 415 U.S. 528, 536 (1974).

If the question is "Does the decision of the Court of Appeals conflict with these settled decisions?" then peti-

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* References are to pages of the petition.

tioner must establish that the claim is "essentially fictitious", "wholly insubstantial", "obviously frivolous", "obviously without merit" or "plainly unsubstantial". Or, Boeing must show that "previous decisions of this Court * * * foreclose the subject" and that the claim is "so attenuated and unsubstantial as to be absolutely devoid of merit". Boeing makes no attempt to show that the claim is frivolous, insubstantial or foreclosed.

The Court of Appeals devoted five pages (14a-19a) to analysis of the legislative history, the judicial precedents and "the developing case law" (16a) for the purpose of showing that there is a claim "sufficient for jurisdictional purposes" (19a). Boeing makes no effort to contradict any part of the Court of Appeals' reasoning or its citations. Boeing does not show any foreclosure of the contention that the scheme of federal securities regulation creates private rights when there is a violation of the requirements of the New York Stock Exchange Manual.

Thus, the petition does not satisfy Rule 19.

POINT II

Semantics do not justify certiorari

The Court of Appeals said that the claim based on violation of the Manual "is a colorable one" (14a). Boeing says "colorable" is the antonym of "substantial", therefore, the claim must be "wholly insubstantial".

Whatever the Court of Appeals meant by "colorable" we cannot believe that it equated "colorable" with "wholly insubstantial". To assume that it did is to assume that it did not know of the decisions of this Court and that it felt that a "wholly insubstantial" claim was still "sufficient for jurisdictional purposes".

Obviously, the Court meant something else by "colorable". It clearly meant to contrast "colorable" with "frivolous" and "wholly insubstantial". But the question is not what it meant by the word but whether the claim is in fact "frivolous" or "wholly insubstantial".

POINT III

Diversity jurisdiction is conceded and other federal claims exist rendering academic the question suggested by the petition.

Each of several plaintiffs was entitled to sue in the federal courts based on diversity and the jurisdictional amount. Boeing concedes this (13, Footnote). There were additional federal claims to which we shall refer immediately.

Why, in view of the clear diversity jurisdiction, the Court of Appeals went to the length it did on the jurisdictional issue we do not know, but perhaps it was to make clear on remand that the damages of those plaintiffs whose claims did not reach $10,000 were also to be fixed by the District Court.

Under New York law those whose damages are less than $10,000 are entitled to recover under the doctrine of *res adjudicata.*

> *Schwartz* v. *Public Administrator,* 24 NY 2d 65, 298 NYS 2d 955 (1969)

Having decided the jurisdictional question on one ground, the Court of Appeals found it "unnecessary for us to determine whether there is any cause of action under the Trust Indenture Act, 15 U.S.C. §77bbb, as appellants contend" (26a) and the Court merely pointed to Boeing's "token compliance therewith" (12a, Footnote 11).

Most of the trial was devoted to the violation by Boeing of Section 10(b) and Rule 10b-5 in a deceitful adjustment of the conversion rate. The District Court devoted nine pages to the issue (51a-59a), the Court of Appeals five (26a-30a). We do not here go into the merits of the claim but we must say that in addition to the conversion issues considered in the cited pages there was a third which we characterized in our brief to the Court of Appeals in this way:

> "The breach which is absolutely incontestable is that with respect to the option shares" (p. 43)

and

> "He [Judge Ryan] did not consider violation of Section 4.05(b)(v) the option clause, at all" (p. 55).

Nor did the Court of Appeals. But the opinions of both Courts demonstrate how real and significant the 10b-5 claim was.

The Court of Appeals said that it did not consider the wrongful conversion claim in connection with jurisdiction because "appellants would not have standing to assert it" (26a). We respectfully believe that this was a misapprehension induced by still another issue in the case which is not relevant here.

The redemption of the debentures would be a "purchase" or "sale" within Section 10b and obviously a conversion of the debenture into stock would be. There would be no question of privity. An action in deceit to recover the number of shares which plaintiffs should have received in conversion of the debentures surely presented a 10(b) claim which plaintiffs had standing to assert.

Thus, a review of the substantiality of the Manual claim would be an academic matter so far as this case is concerned; for there is admittedly diversity jurisdiction and there are other federal claims as well.

POINT IV

The Court of Appeals properly determined the applicable substantive law.

The Court of Appeals did not say that its holding of inadequate notice was a determination under the law of New York. It may have believed the issue to be within the scope of federal regulation of securities. Or, it may have believed, despite the provision in the indenture that New York law would govern, that the variety of residences of the bondholders justified a federal determination.

However, we shall assume with Boeing that the Court of Appeals stated what it believed to be the law of New York.

Boeing admits that there is no decision of any New York Court on the issue. There is one decision by a court of first instance to the effect that the Wall Street Journal is a newspaper of general circulation (13a). That is the sum total of New York decisions adduced.

The Court of Appeals sits in New York and we believe that at least two of the three judges who sat in this case are members of the New York bar. This Court decided long ago, under *Erie,* that when there is no decision of the state court on the subject, the federal court must determine what it believes that law would be. *Meredith* v. *Winter Haven,* 320 US 228 (1943). 1A Moore's Federal Practice (2d ed. 1965) ¶0.309, pp. 3215, 3301 et seq.

The difficulty of ascertaining what a state court decision would be does not "afford a sufficient ground for a federal court to decline to exercise jurisdiction to decide a case which is properly brought to it for decision." *Meredith, supra,* at p. 234. A refusal to rule on that law merely because the answers "have not yet been given by the high-

est court of the state would thwart the purposes of the jurisdictional act." Id. at pp. 234-5.

In *Meredith,* as here, the Court pointed out:

> "No litigation is pending in the state courts in which the questions here presented could be decided." (p. 237)

If, in the long history of coupon convertible debentures no such case has arisen, it is improbable that one will arise now with the declining use of coupons and the effect on the financial community of the decision in this case. No matter of state policy is involved.

CONCLUSION

The petition should be denied for failure to show either a ground specifically described in Rule 19 or any other ground impelling the exercise of discretion to grant it.

Respectfully submitted,

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